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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE  
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Proceeding	91184213
Party	Plaintiff Galaxy Metal Gear, Inc.
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Date	07/20/2009
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**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE  
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD**

In the matter of Application Serial No.: 78914975

Filed: 6/22/2006

Mark: METAL GEAR

GALAXY METAL GEAR, INC.,

Opposer,

vs.

DIRECT ACCESS TECHNOLOGY, INC.

Applicant.

Opposition No.: 91184213

Action filed: May 20, 2008

**OPPOSER'S NOTICE OF RELIANCE ON  
APPLICANT'S CROSS-COMPLAINT**

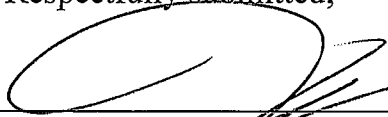
**OPPOSER'S NOTICE OF RELIANCE ON**

**APPLICANT'S CROSS-COMPLAINT**

Pursuant to TBMP §704.06(a), Opposer Galaxy Metal Gear, Inc., hereby serves notice that it intends to rely on the Cross-Complaint filed by Applicant, Direct Access Technology, Inc., in the case of Galaxy Metal Gear, Inc., v. Direct Access Technology, Inc., in the Los Angeles Superior Court case # BC 382375, attached hereto.

Respectfully submitted,

**Dated:** July <sup>17</sup>, 2009

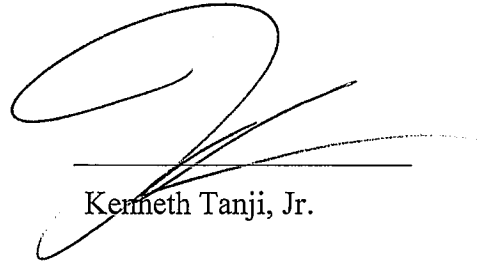
  
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## CERTIFICATE OF SERVICE

The undersigned Attorney hereby certifies that a true copy of the foregoing  
OPPOSER'S NOTICE OF RELIANCE ON APPLICANT'S CROSS-COMPLAINT was  
served by depositing a copy of same in the United States mail, first class postage prepaid,  
to the following address on JUL 24, 2009.

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Attorneys for Defendant and Cross Complainant  
4 DIRECT ACCESS TECHNOLOGY, INC.

5  
6  
7  
8 SUPERIOR COURT OF THE STATE OF CALIFORNIA  
9 FOR THE COUNTY OF LOS ANGELES  
10

11 GALAXY METAL GEAR, INC., a California  
corporation;

12  
13 Plaintiff,

14 vs.

15 DIRECT ACCESS TECHNOLOGY, INC., a  
16 California corporation;

17  
18 Defendants.

19 DIRECT ACCESS TECHNOLOGY, INC., a  
20 California corporation;

21 Cross Complainant,

22 vs.

23 GALAXY METAL GEAR, INC., a California  
24 corporation, and DOES 1-100 inclusive;

25  
26 Cross Defendant.  
27  
28

CASE NO. BC382375

[ASSIGNED TO THE HON. ANN I.  
JONES, DEPT. 40, FOR ALL  
PURPOSES]

CROSS COMPLAINT FOR: (1)  
VIOLATION OF 15 U.S.C. SECTION  
1126(a); (2) COMMON LAW  
TRADEMARK INFRINGEMENT; (3)  
DILUTION; (4) COMMON LAW  
UNFAIR COMPETITION; (5)  
UNFAIR COMPETITION -  
BUSINESS AND PROFESSIONS  
CODE SECTION 17200

1 Cross Complainant DIRECT ACCESS TECHNOLOGY, INC. as and for its Cross Complaint  
2 against the Defendant, alleges as follows:

3  
4 INTRODUCTION

5 1. Since at least May 2003 Cross Complainant has been using the mark "METAL GEAR"  
6 on enclosures for external computer hard drives imported and distributed by it. Cross Complaint has  
7 a common law trademark in the mark "METAL GEAR" when used on enclosures for external computer  
8 hard drives. Cross Defendant GALAXY METAL GEAR is a competitor of Cross Complainant, and  
9 stole Cross Complainant's "METAL GEAR" trademark, without compensation, and placed "METAL  
10 GEAR," "GALAXY METAL GEAR" "METAL GEAR BOX" and "METAL GEAR BOX II" on its  
11 enclosures for external computer hard drives and other computer components and accessories, to break  
12 into this area and to gain a competitive advantage, thus embarking upon a nefarious scheme to capitalize  
13 upon and to usurp Cross Complainant's good name to enter into the marketplace, derive profits from its  
14 use, and to defraud and deceive consumers into believing that the Cross Defendant's goods are the Cross  
15 Complainant's. Cross Defendant has been palming off external hard drives and optical enclosure cases  
16 bearing the "METAL GEAR," "GALAXY METAL GEAR" "METAL GEAR BOX" and "METAL  
17 GEAR BOX II" marks, as Cross Complainant's "METAL GEAR" external computer hard drives. Cross  
18 Defendant's external computer hard drives are not imported or sold by Cross Complainant. The  
19 enclosures for external computer hard drives and optical enclosure cases being sold by Cross Defendant  
20 are, therefore, being sold fraudulently, illegally, and unfairly and are misleading consumers and retailers  
21 into believing they are imported and distributed by Cross Complainant. By their phony and misleading  
22 advertising and packaging, Cross Defendant is defrauding and deceiving consumers, as consumers are  
23 unable to discern the true importer or distributor, and are thus unable to obtain warranty and product  
24 information. The purpose of this complaint is to put an end to the evil scheme and stop the illegal,  
25 fraudulent and unfair practices employed by Cross Defendant in effectuating that scheme.

26  
27 2. Cross Defendant attempted to register the GALAXY METAL GEAR mark on the register  
28 with the United States Patent and Trademark Office. Cross Complainant opposed that registration on

1 the grounds that Cross Defendant did not own the mark and on the grounds that it was confusingly  
2 similar to Cross Complainant's mark. Recently Cross Defendant has abandoned the attempt at  
3 registration of the GALAXY METAL GEAR mark with prejudice. Accordingly, any and all limitations  
4 of action were equitably tolled during the period proceedings were pending before the United States  
5 Patent and Trademark Office.

### 7 THE PARTIES

8 3. Cross Complainant Direct Access Technology, Inc. ("DAT") is a California corporation  
9 with its principal place of business in the City of Industry, California. DAT is an importer and  
10 distributor of the METAL GEAR enclosures for external computer hard drives.

11  
12 4. Cross Complainant is informed and believes, and thereon alleges, that Cross Defendant  
13 GALAXY METAL GEAR, INC. is a citizen of the State of California being incorporated in that State  
14 and having its principal place of business in Brea, California, and at all times pertinent hereto was doing  
15 business in the State of California.

16  
17 5. The true names and/or capacities, whether individual, corporate, associate,  
18 co-conspirators or otherwise, of Cross Defendants Does 1 - 100, inclusive, are unknown to Cross  
19 Complainant, and Cross Complainant therefore sues these Cross Defendants by said fictitious names.  
20 Cross Complainant will seek to amend this Cross Complaint to show the true names and/or capacities  
21 of these Cross Defendants when this information has been ascertained. Cross Complainant is informed  
22 and believes and thereon alleges that each of the Cross Defendants designated herein as Doe is legally  
23 responsible and liable in some actionable manner for the incidents, circumstances, events and/or  
24 happenings referred to herein and proximately caused the damages suffered by Cross Complainant as  
25 alleged herein, and/or is subject to relief sought by Cross Complainant.

26  
27 6. Cross Complainant is informed and believes and thereon alleges that all times mentioned  
28 herein, each Cross Defendant, including those named fictitiously herein, in addition to acting for himself,

1 herself, or itself and on his, her or its own behalf individually, are and were acting as the agent, servant,  
2 employee, representative, principal, partner, associate, joint venturer and/or co-conspirator of, and with  
3 a knowledge, consent and permission of, each and all of the other of said Cross Defendants and therein  
4 the course, scope and authority of said agency, service, employment, representation, partnership,  
5 association, joint venture, or conspiracy.

6  
7 **FIRST CAUSE OF ACTION**

8 **(15 U.S.C. 1125 (a))**

9 **for METAL GEAR - Lanham Act section 43(a) - unregistered mark**

10 7. Cross Complainant re-alleges and incorporates by reference the allegations in paragraphs  
11 1 through 6 as though fully set forth herein.

12  
13 8. At all material times herein, Cross Complainant has been and is engaged in the  
14 importation and interstate wholesale distribution and sale of enclosures for external computer hard  
15 drives.

16  
17 9. Cross Complainant displays its logo on the enclosures for external computer hard drives  
18 it sells and on advertising associated therewith. By virtue of advertising and sales, together with  
19 consumer acceptance and recognition, Cross Complainant's mark identifies Cross Complainant's  
20 enclosures for external computer hard drives only, and distinguishes them from enclosures for external  
21 computer hard drives imported and sold by others. Cross Complainant's mark has thus become and is  
22 a valuable asset symbolizing Cross Complainant, its quality enclosures for external computer hard  
23 drives, and its goodwill.

24  
25 10. The law prohibits the use and commercial advertising of any false or misleading  
26 description or statement of fact regarding the nature, characteristics, qualities or geographic origin of a  
27 person's goods.

1           11. Cross Defendant, with actual notice, or at least constructive notice, of Cross  
2 Complainant's ownership of the trademark "METAL GEAR" has used the names "METAL GEAR,"  
3 "GALAXY METAL GEAR," "METAL GEAR BOX" and "METAL GEAR BOX II" on its external  
4 computer hard drives, optical enclosure cases and other computer components and accessories. It has  
5 used the names in advertising, brochures, promotional materials, etc. for products which are not Cross  
6 Complainant's METAL GEAR devices.

7  
8           12. By advertising, promoting, offering for sale and selling enclosures for external computer  
9 hard drives and other computer components and accessories under the names "METAL GEAR,"  
10 "GALAXY METAL GEAR," "METAL GEAR BOX" and "METAL GEAR BOX II" and using  
11 brochures, decals, markings, materials and packaging with the "METAL GEAR," "GALAXY METAL  
12 GEAR," "METAL GEAR BOX" and "METAL GEAR BOX II" name thereon, in a conscious and  
13 deliberate attempt to simulate Cross Complainant's distinctive mark and name with the deliberate intent  
14 to obtain market acceptance for Cross Defendant's products based on the merit, reputation and goodwill  
15 built up over many years by Cross Complainant in conjunction with its enclosures for external computer  
16 hard drives, Cross Defendant has used, in commerce, the "METAL GEAR," "GALAXY METAL  
17 GEAR," "METAL GEAR BOX" and "METAL GEAR BOX II" marks in a manner likely to cause  
18 confusion, or to cause mistake, or to deceive or misrepresent the nature, characteristics, qualities, or  
19 geographic origin of its and/or Cross Complainant's enclosures for external computer hard drives in  
20 violation of 15 U.S.C. section 1125(a).

21  
22           13. On information and belief, Cross Defendant's conduct is deceptive and likely to cause  
23 confusion and create misleading and mistaken perceptions regarding Cross Complainant's and Cross  
24 Defendant's products. These activities constitute unfair business practices. Furthermore, Cross  
25 Defendant is palming off its product as if it were the product imported and distributed by Cross  
26 Complainant. Such palming off constitutes unfair business practices.

1           14.     As a result of the sales and advertising by Cross Complainant under the METAL GEAR  
2 trademark, the mark has developed and now has a secondary and distinctive trademark meaning to  
3 potential purchasers in California, in that potential purchasers in California have come to associate  
4 enclosures for external computer hard drives bearing the mark with Cross Complainant. As a result of  
5 this association, Cross Defendant's use of Cross Complainant's mark is likely to cause confusion or  
6 mistake or to deceive the public as to the source of origin of enclosures for external computer hard drives  
7 imported, distributed, sold, or offered for sale by Cross Defendant.

8  
9           15.     On information and belief, these advertisements and statements are material and likely  
10 to influence, and have influenced, purchasing decisions of consumers and retailers.

11  
12           16.     Despite Cross Complainant's requests to the contrary, Cross Defendant have failed and  
13 refused, and continue to fail and refuse, to cease and desist from further use of the name "METAL  
14 GEAR," "GALAXY METAL GEAR," "METAL GEAR BOX" and "METAL GEAR BOX II" on their  
15 external computer hard drives and optical enclosure cases.

16  
17           17.     As a proximate result of advantage accruing to Cross Defendant's businesses from Cross  
18 Complainant's good name, advertising, sales and consumer recognition, and as proximate result of the  
19 confusion, mistake, deception and a combination thereof, caused by Cross Defendant's wrongful  
20 advertising and sale of their goods as herein alleged, bearing the "METAL GEAR," "GALAXY METAL  
21 GEAR," "METAL GEAR BOX" and "METAL GEAR BOX II" Cross Defendant has made substantial  
22 sales and/or profits in an amount to be determined at trial.

23  
24           18.     As a proximate result of advantage accruing to Cross Defendant's business from Cross  
25 Complainant's nationwide and international name recognition, advertising, sales and consumer  
26 recognition, and as a proximate result of confusion, deception, mistake and a combination thereof caused  
27 by Cross Defendant's wrongful advertising and sale of their goods as alleged above bearing the name  
28 "METAL GEAR," "GALAXY METAL GEAR," "METAL GEAR BOX" and "METAL GEAR BOX

1 II" Cross Complainant has been deprived of the value of its mark as a commercial asset in an amount  
2 to be determined at trial.

3  
4 19. The wrongful conduct of Cross Defendant as described herein, including their false and  
5 misleading advertising and packaging of their external computer hard drives and computer components  
6 and accessories, its use in commerce of the METAL GEAR trademark, its acts of unfair competition,  
7 and its palming off constitute violations of the Lanham Act, 15 U.S.C. section 1125(a).

8  
9 20. This action by Cross Defendant constitutes an exceptional case under 15 U.S.C. section  
10 1117(a).

11  
12 21. Cross Complainant has been damaged by Cross Defendant's wrongful conduct in an  
13 amount to be determined at trial.

14  
15 22. On information and belief, Cross Defendant has wrongfully acquired sums by means of  
16 such false and misleading advertising.

17  
18 23. Because of Cross Defendant's Lanham Act violations, Cross Complainant has been  
19 irreparably harmed, and will continue to suffer irreparable harm unless Cross Defendant is enjoined from  
20 continuing the wrongful conduct described herein.

21  
22 **SECOND CAUSE OF ACTION**

23 **(Common Law Trademark Infringement)**

24 24. Cross Complainant re-allege and incorporate herein by reference the allegations in  
25 paragraphs 1 through 23 as though fully set forth herein.

26  
27 25. This cause of action arises under the common law prohibition of trademark infringement.

1           26.     Cross Complainant has used the trademark "METAL GEAR" since at least 2003 to  
2 identify and distinguish the enclosures for external computer hard drives that it imports, distributes, sells,  
3 and offers for sale in California and elsewhere from those imported, distributed, sold, and offered for  
4 sale by others, by, among other things, prominently displaying them on its enclosures for external  
5 computer hard drives. In addition, Cross Complainant has prominently displayed the mark on  
6 advertisements in trade magazines and wherever METAL GEAR products are offered for sale.

7  
8           27.     As a result of the sales and advertising by Cross Complainant under its trademark, the  
9 mark has developed and now has a secondary and distinctive trademark meaning to potential purchasers  
10 in California and elsewhere, in that potential purchasers in California and elsewhere have come to  
11 associate enclosures for external computer hard drives bearing the mark with Cross Complainant. As  
12 a result of this association, Cross Defendant's use of Cross Complainant's mark is likely to cause  
13 confusion or mistake or to deceive the public as to the source of origin of external computer hard drives  
14 and other computer components and accessories imported, distributed, sold, or offered for sale by Cross  
15 Defendant.

16  
17           28.     The aforesaid acts of Cross Defendant have violated and infringed upon the ownership  
18 rights of Cross Complainant as the owner of the trade names "METAL GEAR" in direct violation of  
19 California common law prohibiting trademark infringement.

20  
21           29.     As a proximate result of the conduct of Cross Defendant, and each of them, Cross  
22 Complainant has been damaged by Cross Defendant's wrongful conduct in an amount to be determined  
23 at trial.

24  
25           30.     Because of Cross Defendant's acts, Cross Complainant has been irreparably harmed, and  
26 will continue to suffer irreparable harm, unless Cross Defendant is restrained from their acts of  
27 wrongdoing.

28

31. The conduct of Cross Defendant as set forth herein, is and has been despicable, has been done with conscious disregard of Cross Complainant's rights or with the intention of depriving Cross Complainant of property or legal rights, or otherwise constituted oppression fraud or malice under California Civil Code sections 3288 and 3294, thereby entitling Cross Complainant to punitive or exemplary damages in an amount sufficient to punish or set an example of the Cross Defendant, and entitling Cross Complainant to prejudgment interest.

### THIRD CAUSE OF ACTION

(Dilution)

(Business and Professions Code section 14330)

32. Cross Complainant re-alleges and incorporates herein by reference the allegations in paragraphs 1 through 31 as though fully set forth herein..

33. This cause of action is for dilution of the distinctive quality of the mark "METAL GEAR" and injury to business reputation pursuant to California Business and Professions Code section 14330.

34. Through Cross Defendant's use and advertisement of the "METAL GEAR," "GALAXY METAL GEAR" and "METAL GEAR II" trademarks on their external computer hard drives, there exists a likelihood of injury to the business reputation of Cross Complainant and a likelihood of dilution of the distinctive quality of Cross Complainant's "METAL GEAR" trademark in violation of Business and Professions Code section 14330.

35. As a proximate result of Cross Defendant's conduct, Cross Complainant has been damaged in an amount to be determined at trial.

36. Because of Cross Defendant's acts, Cross Complainant has been irreparably harmed, and will continue to suffer irreparable harm, unless Cross Defendant is restrained from their acts of wrongdoing.



1 California Civil Code sections 3288 and 3294, thereby entitling Cross Complainant to punitive or  
2 exemplary damages in an amount sufficient to punish or set an example of the Cross Defendant, and  
3 entitling Cross Complainant to prejudgment interest.

4  
5 **SIXTH CAUSE OF ACTION**

6 **(Unfair Competition)**

7 **(Business and Professions Code section 17200)**

8 42. Cross Complainant re-alleges and incorporates herein by reference the allegations in  
9 paragraphs 1 through 41 as though fully set forth herein.

10  
11 43. Cross Defendant's wrongful conduct as described in the foregoing paragraphs constitutes  
12 statutory unfair competition under Business & Professions Code section 17200, *et seq.*

13  
14 44. On information and belief, Cross Defendant has wrongfully placed the marks "METAL  
15 GEAR," "GALAXY METAL GEAR," "METAL GEAR BOX" and "METAL GEAR BOX II" on their  
16 external computer hard drives and other computer components and accessories and acquired sums of  
17 money by means of such unfair competition, in violation of Business & Professions Code section 17200,  
18 *et seq.*

19  
20 45. As a proximate result of Cross Defendant's conduct, Cross Complainant has been  
21 damaged in an amount to be determined at trial. Because of Cross Defendant's acts of unfair  
22 competition, Cross Complainant has been irreparably harmed, and will continue to suffer irreparable  
23 harm unless and until Cross Defendant is restrained from their acts of unfair competition.

24  
25 **WHEREFORE, Cross Complainant prays for judgment that:**

26 1. Cross Complainant be awarded under 15 U.S.C. section 1117 damages sustained by Cross  
27 Complainant, and all of Cross Defendant's profits in an amount to be proven at trial, together with costs  
28 of this action;

1           2.       That the Lanham Act damages awarded Cross Complainant be increased up to three times  
2 the amount found or assessed under, *inter alia*, 15 U.S.C. section 1117(a).

3  
4           3.       That Cross Complainant be awarded its reasonable attorneys' fees against Cross  
5 Defendant under, *inter alia*, 15 U.S.C. section 1117 (a).

6  
7           4.       That Cross Defendant and all of their officers, agents and employees and all other persons  
8 in active concert or participation with them receive actual notice of the injunction by personal service  
9 or otherwise, be preliminarily and permanently enjoined from (a) using the "METAL GEAR,"  
10 "GALAXY METAL GEAR," "METAL GEAR BOX" and "METAL GEAR BOX II" trademark and/or  
11 any other confusingly similar mark to the METAL GEAR mark owned by Cross Complainant; and (b)  
12 unfair, deceptive, fraudulent and unlawful acts and all other acts of unfair competition;

13  
14           5.       For an order requiring Cross Defendant to deliver up and destroy all infringing materials,  
15 including but not limited to all products bearing "METAL GEAR," "GALAXY METAL GEAR,"  
16 "METAL GEAR BOX" and "METAL GEAR BOX II" marks, all advertising brochures, manuals,  
17 letterhead, tapes, videos or any other documentation bearing the "METAL GEAR," "GALAXY  
18 METAL GEAR," "METAL GEAR BOX" and "METAL GEAR BOX II" names;

19  
20           6.       That Cross Complainant be awarded damages in an amount to be proven at trial as a  
21 result of Cross Defendant's wrongdoing.

22  
23           7.       That Cross Complainant be awarded restitution pursuant to California Business &  
24 Professions Code section 17203 for all sums wrongfully acquired by Cross Defendant by means of the  
25 unfair competition in which it has engaged;

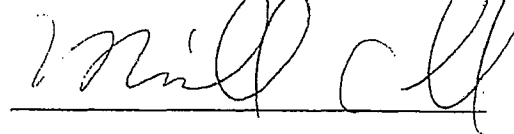
26  
27           8.       That Cross Complainant be awarded punitive or exemplary damages in an amount  
28 sufficient to punish or set an example of Cross Defendant;

1           9.     That Cross Complainant be awarded/granted prejudgment interest on all damages  
2 awarded to Cross Complainant; and

3  
4           10.    That Cross Complainant be awarded such other and further relief as the court determines  
5 is just and proper.

6  
7 Dated: April 4, 2008

LAW OFFICE OF MICHAEL C. OLSON, P.C.

8   
9

10 Michael C. Olson, Esq.  
11 Attorney for Defendant and Cross Complainant DIRECT  
12 ACCESS TECHNOLOGY, INC  
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